Supreme Court, U.S.
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No. 95-8736

In the Supreme Court of the United States

OCTOBER TERM, 1996

LARRY OSA OGBOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF UNITED STATES IN SUPPORT OF SUGGESTION OF MOOTNESS

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1. a. Petitioner contends (Pet. Response 6-11) that the case is not moot because he continues to be subject to adverse collateral consequences flowing from the "judicial order of deportation." First, he suggests (at 6-7) that the Immigration and Naturalization Service (INS) order of deportation that was entered against him may have been based on consideration of the order imposing deportation as a condition of supervised release in this case. That is incorrect.

The administrative order of deportation pending against petitioner was not based on the order imposing deportation as a condition of supervised release in this case. The INS order to show cause, the warrant

of deportation, and the orders of the immigration judge show that petitioner was found to be deportable under then-current Section 241(a)(1)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(A). That Section applied to petitioner because he was excludable at the time of entry based on the fact that he had been previously arrested and deported and reentered the United States without the consent of the Attorney General as required under then-current Section 212(a)(6)(B)(i), 8 U.S.C. 1182(a)(6)(B)(i). See U.S. Lodging 1a-12a. In addition, review of the tape-recorded immigration proceedings confirms that the judicial deportation order was not the basis for the finding of deportability or the administrative deportation order.[1]

Second, petitioner asserts (Pet. Response 7) that his INS deportation order was based on his conviction for reentry after deportation, in violation of 8 U.S.C.

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[1] We provided counsel for petitioner with a copy of the tape-recorded immigration proceedings on December 23, 1996. That tape-recording reveals that, although neither petitioner nor his immigration counsel was present at the final deportation hearing on May 12, 1996, that hearing was merely a continuation of deportation proceedings that had been initiated against petitioner in Oakdale, Louisiana, where he had been incarcerated. By the time of the May 12 hearing, an immigration judge already had found, at a January 4, 1995, hearing, by clear, convincing and unequivocal evidence, that petitioner was deportable under the INA based on his reentry, without consent of the Attorney General, after deportation. Petitioner's immigration counsel participated in that January 4 hearing and waived petitioner's presence. The only remaining issue was whether petitioner could obtain relief from deportation. Petitioner waived any claim to such relief by failing to appear at the May 12 hearing despite the fact that proper notice had been provided his immigration counsel of record.

1326, and that the earlier deportation also was based on a judicial order under 18 U.S.C. 3583(d). Thus, he reasons that the INS order would be undermined if he prevails in this Court.

Petitioner's earlier deportation was not based on a judicial order of deportation under Section 3583(d). The September 5, 1991, judgment in that case (App., *infra*, 1a-5a) provides that petitioner was to depart the United States and that he would be in violation of the sentence if he were found in the United States after four days. *Id.* at 5a. Petitioner was ultimately deported by the INS on November 20, 1991, based on a March 25, 1991, order of an immigration judge. See *Id.* at 6-7a, 8a. That administrative order, the underlying February 19, 1991, order to show cause, and the deportation warrant all indicate that petitioner's deportation was effected pursuant to the immigration judge's order that he be deported under then-current Section 241(a)(4) of the INA because he had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal conduct. See App., *infra*, 6a-11a.

In any event, petitioner's argument is premised on the assertion that he is continuing to challenge his administrative deportation order (see Pet. Response 7), and that he could use a favorable ruling in this case to his advantage in the administrative proceedings. To the contrary, petitioner never challenged the administrative order on grounds related to his judicial deportation order. When petitioner sought reopening of the administrative deportation proceedings, the only grounds he cited were the lack of proper notice and an unsubstantiated asylum claim, both of which the immigration judge found inadequate to support reopening. See U.S. Lodging 12a. And,

petitioner has not sought any further review before the Board of Immigration Appeals of his administrative deportation order or the denial of his motion to reopen. Thus, the administrative order is final. See *Stone* v. *INS*, 115 S. Ct. 1537, 1542 (1995).[2]

b. Petitioner also notes (Pet. Response 8-11) that collateral consequences could flow from an *executed* order of deportation. For example, he asserts that a prior deportation may be used in a subsequent criminal history calculation or might be used in subsequent immigration proceedings to preclude a finding of good moral character or as a basis for denial of discretionary relief.

Those collateral consequences, however, have no application to petitioner because his deportation order was never executed. Petitioner was not deported

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[2] Amicus curiae recognizes (Amicus Response 10-14) that the final administrative order of deportation pending against petitioner "may well deprive petitioner of any 'legally cognizable interest in the outcome' " of the case, thereby rendering it moot. *Id.* at 10 (quoting in part *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980)). Amicus suggests (Amicus Response 10-11), however, that the administrative order may not render the case non-justiciable because duplicative administrative orders of deportation are likely to render moot other cases involving other criminal aliens raising the same issue. Amicus proposes that the "capable of repetition, yet evading review" doctrine could therefore be applied here, in spite of the fact that the other cases would involve different parties. As we noted in our suggestion of mootness, however, after the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009 (*reproduced at* 138 Cong. Rec. H11,798 (daily ed. Sept. 28, 1996)) (to be codified at 8 U.S.C. 1230(a)(3)), cases raising the same issue will no longer arise—Section 304(a)(3) of IIRAIRA overrides the holding of the court of appeals in this case.

pursuant to the judicial deportation condition of his supervised release. And there is no possibility that petitioner will be deported in the future under that order because his supervised release was revoked and no longer exists. See Suggestion of Mootness 3-4. Petitioner provides no legal support for his suggestion (Pet. Response 2-3) that an order of deportation that is imposed under a statute that authorizes conditions of supervised release could survive after the revocation of the supervised release.

2. Amicus asserts (Amicus Response 3-4) that the order against petitioner in the Alabama district court case, that he be deported as a condition of supervised release in that case, means that the instant case is justiciable because petitioner is reasonably likely to be subjected to the same official action again.

As amicus acknowledges, the Court "generally [has] been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." Amicus Response 3 (quoting *Honig* v. *Doe*, 484 U.S. 305, 320 (1988)). That petitioner already had engaged in the unlawful additional misconduct at the time of the supervised release revocation in the instant case does not alter the fact that the instant case should not be saved from mootness as a consequence of petitioner's unlawful conduct. Cf. *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982).

Amicus contends (Amicus Response 3-10) that, despite the fact that petitioner did not appeal from the judicial order of deportation in the Alabama district court case, the "capable of repetition, yet evading review" exception to the mootness doctrine could apply here. He indicates that, even though petitioner's Alabama case, in fact, evaded appellate review because

petitioner did not appeal, the case might have evaded review even if petitioner had appealed because he may not have been able to obtain review by this Court before being deported. See *id.* at 7-8. Amicus acknowledges that a stay would have resolved that problem, however.

The simple fact is that a ruling in this case would have no direct consequence for petitioner's Alabama sentence because he did not appeal it. Moreover, any collateral relief that petitioner might seek would not only have to overcome a cause and prejudice standard (see Amicus Response 11-12 n.5), but would also have to overcome the fact that petitioner consented to the deportation condition as part of his guilty plea.

For the foregoing reasons and those set forth in our suggestion of mootness, the case is now moot and should be dismissed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

ORIGIN...

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SEP 5 1991
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By: D. Park Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number:
1:91-cr-120-01-JOF

vs.

Michael Maloof
Deft.'s Attorney

LARRY OSA OGBOMON

The defendant pleaded guilty to counts one and three.

Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

Title & Section	Nature of Offense	Count Numbers
18:1344	Bank Fraud	one and three

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform of 1984.

IT IS ORDERED that the defendant shall pay to the United States a special assessment of $100.00, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

ATTEST: A TRUE COPY
CERTIFIED THIS
OCT 3 1991
Luther D. Thomas, Clerk
By: Deputy Clerk

AO 72A
Rev. 8/82)

Defendant's Soc. Sec. No.
253-57-0163

Defendant's mailing address
Federal Penitentiary
Atlanta, Georgia

August 30, 1991
Date of Imposition of Sentence

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

Defendant's residence address
Federal Penitentiary
Atlanta, Georgia

9/5/91
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FOURTEEN (14) MONTHS.

Defendant: LARRY OSA OGBOMON
Case Number: 1:91-cr-120-01-JOF

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state, or local crime;

2) The defendant shall not leave the judicial district without the permission of the court or probation officer;

3) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) The defendant shall support his or her dependents and meet other family responsibilities;

6) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) The defendant shall notify the probation officer within seventy-two hours of any change of residence or employment;

8) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

Defendant: WILLIAM ARTHUR HIXSON
Case Number: 1:91-cr-43-02-JOF

12) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: LARRY OSA OGBOMON
Case Number: 1:91-cr-120-01-JOF

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS, with the SPECIAL CONDITION that the defendant depart the United States. If the defendant is found in the United States more four days, it will be deemed that he violated the sentence.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release.

UNITED STATES OF AMER
DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

WARRANT OF DEPORTATION

No. A28 682 629

To any Officer or Employee of the United States Immigration and Naturalization Service.

After due hearing before an authorized officer of the United States Immigration and Naturalization Service, and upon the basis thereof, an order has been duly made that the alien Larry Osa OGBOMON

who entered the United States at New York, New York

on or about the 4th day of April, 1987, is subject to deportation under the following provisions of the laws of the United States, to wit:

Section 241(a)(4) of the Immigration and Nationality Act.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, command you to take into custody and deport the said alien pursuant to law, at the expense of the Transportation company which brought him to the United States, if practical; otherwise at the expense of the appropriations, "Salaries and expenses, Immigration and Naturalization Service, 19 " including the expense of an attendant, if necessary.

Signature: John B.Z. Caplinger (SIG)

Title: John B. Z. Caplinger, District Director

Date: March 27, 1991

Place: Oakdale, Louisiana

Form I-205
(Rev.11-29-79)N

WARRANT FOR DEPORTATION OF

Larry Osa OGBOMON A28 682 629
(Name of Deportee)

Deported at Port of NYC (port of departure from the U.S.) on 11-20-91 (date of departure)

via TWA-1 904
(manner of departure; identify airline or ship; if other, state: afoot, car, etc.)

Departure witnessed by: Jacqueline Ostertag
(signature and title of officer)

If actual departure not witnessed, fully identify source or means of departure verification:

If self-deportation pursuant to 8CFR 243.5, check here ☐

Officer Executing Warrant: Jacqueline Ostertag
(signature and title)

Date Form Completed: 11-30-91

Comments:

(signature of person fingerprinted)

(signature of official taking print)

right thumb print

(title of official taking print)

U.S. Department of Justi
Exe..tive Office for Immigratic. Review
Office of the Immigration Judge

File A 28 - 682 - 629

n the Matter of OGBOMON, LARRY OSA

In Deportation Proceedings

Respondent

Order of the
Immigration Judge

Upon the basis of respondent's admissions, I have determined that he is eportable on the charge(s) stated in the Order to Show Cause.

Respondent has made no application for relief from deportation.

ORDER: It is ordered that respondent be deported from the United States to IGERIA on the charge(s) contained in the Order to Show Cause.

Copy of this decision has been served upon respondent and the Immigration and Naturalization Service.
Appeal: Waived

Date: 03 / 25 / 91
Place: ALIEN DETENTION CENTER
Record File Copy
Alien's Copy
INS Copy

Charles A. Wiegand

CHARLES A. WIEGAND, III
Immigration Judge

Form EOIR-7
CHG

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A28 682 629

In the Matter of Larry Osa OGBOMON aka: Terry ZOOK; Donald RIGHT Respondent.
C/O:United States Immigration & Naturalization Service
77 Forsyth Street, Atlanta, GEorgia 30303
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Nigeria and a citizen of Nigeria;
3. You entered the United States at New York, New York on or about April 4, 1987;
(date)

"SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF"

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

"SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF"

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at a place, date and time to be set.
on XXXXXXXXXXXXXXXXXXXXXXXX at XXXXXXXXXXXXX m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: February 19, 1991

NEIL JACOBS, Assistant District Director for
(signature and title of issuing officer) Investigations
Atlanta, Georgia
(City and State)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charge set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

☒ Detained in the custody of this Service. ☐ Released on recognizance.

OR

☒ Released under bond in the amount of $ 25,000.00.

You may request the Immigration Judge to redetermine this decision.

☐ I do ☒ I do not request a redetermination by an Immigration Judge of the custody decision.

(signature of respondent) FEB 19TH 1991 (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent) FEB 19TH 1991 (date)

CERTIFICATE OF SERVICE

Served by me at Atlanta, Georgia on February 19, 1991 at 3:30 pm.
by personal service. I-618 served.
Right thumb

Jon Daniel Special Agent
(signature and title of employee or officer)

CONTINUATION SHEET

Name: Larry Osa OGBOMON Date: February 19,1991
Aka: Terry ZOOK; Donald RIGHT File No: A28 682 629

4. You were then admitted as a nonimmigrant visitor for pleasure;

5. On September 28, 1988 your status was adjusted to that of a conditional resident alien;

6. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of six counts of bad checks in violation of Georgia Statute 16-9-20;

7. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of three counts of forgery in the first degree in violation of Georgia Statute 16-9-1;

8. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of one count of theft by taking in violation of Georgia Statute 16-8-2;

9. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of one count of giving a false name to a law enforcement officer in violation of Georgia Statute 16-10-25;

10. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of eight counts of use of false name in the application for driver's license in violation of Georgia Statute 16-10-25.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit, six counts of bad checks, three counts of forgery in the first degree, one count of theft by taking, one count of giving a false name to a law enforcement officer and eight counts of use of a false name in the application for driver's license.